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Access to Deportation Proceedings Following September 11: A Return to the Fundamentals of Richmond Newspapers

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ACCESS TO DEPORTATION PROCEEDINGS FOLLOWING SEPTEMBER 11: A RETURN TO THE FUNDAMENTALS OF *RICHMOND NEWSPAPERS*

I. INTRODUCTION

"The era that dawned on September 11, and the war against terrorism that has pervaded the sinews of our national life since that day, are reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches."[1] In the wake of September 11, 2001, a war against terrorism was declared not only in Afghanistan, but also on our own soil against hundreds of Arab and Muslim nationals living "illegally" in the United States. As of December 2001, the Justice Department had detained more than seven hundred people on immigration charges in connection with the September 11 attacks.[2] The vast majority of the deportation hearings concerning these detainees have taken place behind closed doors pursuant to an order issued by the office of the Chief Immigration Judge Michael Creppy, known as the "Creppy Directive."[3] The Creppy Directive has caused innumerable problems for the media groups seeking access to deportation proceedings. *Detroit Free Press v. Ashcroft*[4] and *North Jersey Media Group, Inc. v. Ashcroft*[5] represent two of these disputes.

Despite very similar reasoning, the two courts responsible for adjudicating *Detroit Free Press* and *North Jersey Media Group* split on the issue of whether the First Amendment affords a right of access to deportation proceedings. The Sixth Circuit, in *Detroit Free Press*, concluded that the First Amendment undoubtedly protects public access to deportation proceedings.[6] Judge Keith declared, "Today, the Executive Branch seeks to take this safeguard away from the public by placing its actions beyond public scrutiny."[7] The Third Circuit, in *North Jersey Media Group*, disagreed with the Sixth Circuit and concluded that the First Amendment does not provide a right of access to deportation

1. N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 202 (3d Cir. 2002).

2. David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 961 (2002).

3. Harlan Grant Cohen, Note, *The (Un)favorable Judgment of History: Deportation Hearings, the Palmer Raids, and the Meaning of History*, 78 N.Y.U. L. REV. 1431, 1442 (2003).

4. 303 F.3d 681 (6th Cir. 2002).

5. 308 F.3d 198 (3d Cir. 2002).

6. *Detroit Free Press*, 303 F.3d at 700.

7. *Id.* at 683.

proceedings.[8] The Third Circuit based this conclusion on the government's interest in protecting national security.[9] Although the two circuits engaged in ideological warfare when weighing national security against freedom of information and access, a deeper, legal question emerged regarding the application of the Supreme Court's jurisprudence in the area of public access to judicial proceedings.

Many scholars have accurately characterized the Supreme Court's right of access precedent as confusing and ambiguous.[10] After years of denying that a constitutional right of access existed, the Supreme Court first announced that the First Amendment protects access to information in criminal trials in *Richmond Newspapers, Inc. v. Virginia*.[11] In this opinion, the Court framed a two-part "experience and logic" analysis to provide lower courts with guidance concerning the right of access included in the First Amendment.[12] Although the Court firmly established the two-pronged test in several cases following *Richmond Newspapers*, it has failed to crystallize many important aspects of that analysis. The ambiguity inherent in the *Richmond Newspapers* analysis is evidenced by uncertainty and inconsistency in the lower courts.[13] The uncertainty of the *Richmond Newspapers* analysis is the most damaging during times of national stress and insecurity. "[A] rule that limits a judge's discretion in deciding questions of core values can better preserve those values during times of stress when pressures may affect proper decision making."[14]

It is therefore essential that the judiciary identify the "core values" under which the First Amendment right of access is to operate. The core values of the right of access can be identified through a closer analysis of the foundation for that right. *Richmond Newspapers* defined the right of access as necessary to the structural interpretation of the First Amendment.[15] For the First Amendment to fulfill its purpose in fostering informed public debate, the people must have access to information.[16] This right must have practical limitations of "experience and logic" to assure that public access will not unduly interfere with government functions.[17] When one considers the current

8. *N. Jersey Media Group*, 308 F.3d at 204-05.

9. *See id.* at 217.

10. Kathleen K. Olson, *Courtroom Access After 9/11: A Pathological Perspective*, 7 COMM. L. & POL'Y 461, 485 (2002); *see also* Michael J. Hayes, Note, *What Ever Happened to the "Right to Know"?: Access to Government-Controlled Information Since* Richmond Newspapers, 73 VA. L. REV. 1111, 1112 (1987).

11. 448 U.S. 555, 580 (1980).

12. *See id.* at 588-89 (Brennan J., concurring).

13. *See, e.g.*, *N. Jersey Media Group*, 308 F.3d 198; Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

14. Olson, *supra* note 10, at 488.

15. *Richmond Newspapers*, 448 U.S. at 587-88 (Brennan, J., concurring).

16. *Id.* at 587.

17. *Id.* at 588-89.

question of access to deportation proceedings in light of this substantive principle, it is clear that Judge Keith of the Sixth Circuit applied the *Richmond Newspapers* principles correctly in *Detroit Free Press.* The opinion issued by Judge Keith affirmatively protects First Amendment rights while considering the various implications of access on national security.

This issue will be explored as follows: Part II will introduce the reader to the background principles and policy surrounding the First Amendment right of access. Part III will discuss the Third and Sixth Circuits' application of the *Richmond Newspapers* analysis in *North Jersey Media Group* and *Detroit Free Press*. Part IV will discuss the constitutionality of the Creppy Directive in light of the fundamental interests of the *Richmond Newspapers* analysis. Next, Part V will demonstrate that the *Richmond Newspapers* test is applicable to deportation proceedings. Finally, Part VI will conclude that the First Amendment does support a qualified right of access to deportation proceedings.

II. HISTORICAL BACKGROUND

A. The Humble Beginnings of a Press Right of Access Under the First Amendment

The Supreme Court has consistently recognized several rights under the First Amendment, including the right of the press to publish and release information freely without interference from the government as well as a right of access to information. Neither right is explicitly granted through the language of the First Amendment; rather, they are considered fundamental to the operation of rights enumerated in the First Amendment.[18] While the Supreme Court has long recognized the right to send information without government interference as fundamental under the First Amendment, the right of access has not been given the same priority.[19]

In the case of *New York Times Co. v. United States*, the Supreme Court refused to allow the government to restrict publication of sensitive materials.[20] In June 1971, the *New York Times* and the *Washington Post* began to publish a series of articles based on sensitive government documents surrounding the war in Vietnam.[21] The United States government sought to prohibit any further publication of the documents, arguing that the publication would be against the interests of national security.[22] The *New York Times* argued that

18. *See* U.S. CONST. amend. I; *see also Richmond Newspapers*, 448 U.S. at 575; Hayes, *supra* note 10, at 1113.

19. Hayes, *supra* note 10, at 1111.

20. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971).

21. *Id.*

22. *Id.* at 718.

the documents contained materials that were largely historical and that prevention of the publication of these articles was nothing more than prior restraint.[23] The Supreme Court, agreeing with the *New York Times*, stated that "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'"[24] The Court then noted, "The Government 'thus carries a heavy burden of showing justification for the imposition of such restraint.'"[25] The Court subsequently found that the government had not satisfied that burden and therefore could not prevent the publication of the so-called Pentagon Papers.[26] In retrospect, it seems that the opinion in *New York Times* indicated that the Supreme Court would be extremely wary of any government attempt to restrict publication of any information, even in cases implicating national security. Therefore, it was widely accepted after *New York Times* that any system of prior restraint would have to bear "a heavy presumption against its constitutional validity."[27]

In light of the Supreme Court's vigilance against prior restraint, it seemed that members of the press would have an unlimited and unalienable right to publish information whenever and however they deemed appropriate. While in theory it was true that members of the media could publish whatever they desired, the government and the court system controlled the right to publish by limiting press access to information.[28] Although *New York Times* protected the press's right to publish information, the opinion does not require that the government give the press access to that information. The right of access under the First Amendment developed slowly and is currently more limited and less developed than the right of the press to publish any information that they freely obtain. In fact, the Supreme Court refused to recognize a First Amendment right of access until 1980, when the Court decided *Richmond Newspapers, Inc. v. Virginia*.[29]

For the majority of the 1970s, the Court refused to disallow any government policy that limited press access to information. The judiciary ignored pleas from the media as well as a change in public opinion demanding

23. *See* Rowena Scott Comegys, Note & Comment, *Potter Stewart: An Analysis of His Views on the Press as Fourth Estate*, 59 CHI.-KENT L. REV. 157, 194 (1982).

24. *N.Y. Times*, 403 U.S. at 714 (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

25. *Id.* (quoting Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

26. *See id.*

27. *Id.*

28. Olson, *supra* note 10, at 474. "Rather than limit what information the press could print, . . . trial judges began to limit what information the press could gather by closing courtrooms." *Id.* In light of the decision in *N.Y. Times*, the courts were very limited in their right to restrict publication of information that the media obtained. The court system retained the right to close its doors to the media and therefore restricted publication by restricting their access to the proceedings. *Id.*

29. 448 U.S. 555 (1980).

access to government information.[30] The Watergate scandal created an atmosphere of distrust and discontent among the public that lead to a demand for information and government accountability.[31] While the Court refused to confront the issue of press access directly, the media found some potential for judicial support in the case of *Branzburg v. Hayes*.[32] *Branzburg* involved several claims in which reporters were subpoenaed to appear in front of a grand jury to reveal their sources. The reporters claimed that they would suffer a severe burden if forced to reveal their sources and therefore should have a "special privilege" allowing them to keep such information secret.[33] Without that privilege, the reporters claimed, they would be unable to effectively report information because current and future sources would be unwilling to reveal information.[34] The Court refused to recognize a special reporter privilege, emphasizing that "'the publisher of a newspaper has no special immunity from the application of general laws.'"[35]

Despite the Court's general disapproval of a reporter's privilege, the majority opinion contained language indicating that the rights of the press extended to more than the right to report information that was obtained from a willing speaker.[36] The Court stated, "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[37]

Despite the encouraging language included in the *Branzburg* opinion, the Court denied that the First Amendment included a special privilege for the press or a right to free access in *Houchins v. KQED, Inc*.[38] In *Houchins*, the

30. *See* Hayes, *supra* note 10, at 1114-15.

31. Andrew Robert Schein, *Attorney Fees for Pro Se Plaintiffs Under the Freedom of Information and Privacy Acts*, 63 B.U. L. REV. 443, 443 (1983).

32. 408 U.S. 665 (1972).

33. *See id.* at 680-81.

34. *Id.* at 682.

35. *Id*. at 683 (quoting Associated Press v. NLRB, 301 U.S. 103, 132-33 (1937)).

36. *Id.* at 681-682.

37. *Branzburg*, 408 U.S. at 681. In *Houchins v. KQED, Inc.*, 438 U.S. 1, 10 (1978), the Court rejected the media's argument that the dictum used in *Branzburg* should be applied to provide a right of access. The Court read the dictum as providing the press with an "undoubted right to gather news 'from any source by means within the law,'" but that it provides no support for the contention that the government must affirmatively supply information to the media. *Houchins*, 438 U.S. at 11 (quoting *Branzburg*, 408 U.S. at 681-82). The language and holding in *Branzburg* is decidedly against the interests of the press, and therefore, the argument made by the Court in *Houchins* seems to make sense. However, subsequent opinions that expanded the right of access relied on this language to support their majority opinions that assert that the First Amendment supports a right of access. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576-77, 580 (1980).

38. *Houchins*, 438 U.S. at 15-16. It is important to note that the decision in *Houchins* relied on the interpretation of the Free Press Clause of the First Amendment. *Id.* at 14. In making their argument, the press relied on the Free Press Clause of the First Amendment to gain access above

Court approached the question of "whether the news media have a constitutional right of access to a county jail . . . to interview inmates and make sound recordings, films, and photographs for publication and broadcasting by newspapers[,] radio and television."[39] KQED, an operator of television and radio stations, requested permission to inspect and photograph the Greystone prison facility in California.[40] After prison officials refused, KQED filed suit alleging that Houchins, the sheriff in charge of access to the facilities, had violated the First Amendment by refusing to permit access.[41] KQED maintained that Houchins's refusal to allow access was effectively a failure to "provide any effective means by which the public could be informed of conditions prevailing in the Greystone facility or learn of the prisoners' grievances."[42]

The Court held that "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."[43] Chief Justice Burger made an important distinction in his majority opinion between a right of access and a First Amendment right to publish and disseminate information to the public. *Houchins* affirmed the position that the Court will not limit the right of the press to publish any information obtained in regard to the prison facility or its prisoners;[44] however, the opinion made it clear that the right to disseminate information is far different from the right to have free access to that information.[45] The Court noted that, while the First Amendment prohibits the government from limiting the publication of information obtained, the First Amendment does not require the government to provide information for publication. The Court noted, "We must not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the

and beyond that which was allowed to the general public. Later cases such as *Richmond Newspapers* and *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), rely on the Free Speech Clause of the First Amendment in granting *both* the public and the press access to criminal proceedings. *See, e.g.*, *Richmond Newspapers*, 448 U.S. at 575-76. The press did not seek a right of access greater than that of the general public. Instead, the Court determined that the press should be granted a right of access as a catalyst to the public. *See id.* at 572-73. The press plays a considerable role in informing the public. *Id.*

39. *Houchins*, 438 U.S. at 3.

40. *Id.*

41. *Id.* at 3-4.

42. *Id.* at 4.

43. *Id.* at 15.

44. *Houchins*, 428 U.S. at 14. The Court determined that the prison facility "cannot prevent respondents from learning about jail conditions in a variety of ways, albeit not as conveniently as they might prefer. Respondents have a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions." *Id.* at 15.

45. *Id.* at 12.

First Amendment."[46] The ground for rejection of a right of access is founded on the principle that the basic goal of the First Amendment is to have the freedom to communicate and publish information.[47] While the Court acknowledged that a "special privilege" of access might be desirable, it was not, in the Court's eyes, essential to this freedom; therefore, it is not mandated by the First Amendment.[48] The First Amendment would not be construed to compel the government to hand over the information for publication, but it would preclude the government from preventing publication after its receipt.[49]

Following the Court's analysis in *Houchins*, the media temporarily turned their attention away from the First Amendment and chose instead to base their argument for open access on the Sixth Amendment. The media considered the Sixth Amendment to be a more fruitful source for those members of the media trying to gain access to closed criminal proceedings. The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and *public* trial."[50] In *Gannett Co. v. DePasquale*, the media argued that the Sixth Amendment literally requires judges to open pretrial criminal proceedings to the public as well as to the press.[51]

In *Gannett*, the owner of a local newspaper challenged a court order excluding the public and the press from a pretrial suppression hearing in a murder case.[52] The defendants requested that the court exclude members of the press and the public from the pretrial hearing after expressing concern that the media circus had already jeopardized their right to a fair trial and further publicity might aggravate an intense situation.[53] The Supreme Court disagreed with the media's interpretation of the Sixth Amendment, concluding instead that the Sixth Amendment provides a right that is personal to the criminal defendant.[54] Justice Stewart, writing for the majority, reasoned that "[t]he Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused."[55] The Court explained further that the Sixth Amendment guarantees a right of an accused to a public trial but does not guarantee that right to the public or the press.[56] The Court refused to recognize a right of access under the Sixth Amendment, but suggested that it might revisit the question of

46. *Id.* at 13.
47. *See id*. at 12.
48. *Id.* at 11-12.
49. *Houchins*, 428 U.S. at 12.
50. U.S. CONST. amend VI (emphasis added).
51. Gannett Co. v. DePasquale, 443 U.S. 368, 391-93 (1979).
52. *Id.* at 375.
53. *Id.*
54. *Id*. at 379-80.
55. *Id.*
56. *Gannett*, 443 U.S. at 380-83.

whether the First Amendment protects a right of access.[57] The Court candidly revealed that, "even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations," it did not feel compelled to decide such a question in this particular case.[58] Therefore, it was uncertain whether the Court would consider a First Amendment right of the press and the public to criminal proceedings in the future.

In light of the fact that the Court refused to recognize a First Amendment right of access to hearings and governmental institutions in *Houchins*, it seems odd that a year later the Court would refuse to address this seemingly settled issue in *Gannett*.[59] *Gannett* brought hope to the media—who, until this point, had been discouraged in their pursuit of a judicially-recognized right of access to information—that the Court would recognize such a right to access. The question the Court left open in *Gannett* would be answered just a year later in *Richmond Newspapers*.

B. Richmond Newspapers, Inc. v. Virginia

Following the Court's decision in *Gannett*, trial judges quickly took advantage of the decision that precluded any successful Sixth Amendment claim of access and proceeded to close their doors to the public and the press.[60] Throughout the 1970s, the Court denied any press claim that the First Amendment required the government to provide information to the press;[61] however, the Court's purposeful oversight of the First Amendment question in *Gannett* infuriated the media.[62] The media found their answer when the Court supported a First Amendment right of access to criminal trials in *Richmond Newspapers*.[63] "[I]n one of the more remarkable and unanticipated turnabouts on the Court, an unconsolidated majority adopted a variation of the so-called structural theory to recognize for the first time a First Amendment-based affirmative right of public access to criminal trial proceedings."[64] The basis of all future decisions expanding the right of access to government proceedings is

57. *See id.* at 392.

58. *Id.*

59. *Id.*

60. Olson, *supra* note 10, at 475-76.

61. Eugene Cerruti, *"Dancing in the Courthouse:" The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 238 (1995).

62. *See* Olson, *supra* note 10 at 475; Beth Hornbuckle Fleming, Comment, *First Amendment Right of Access to Pretrial Proceedings in Criminal Cases*, 32 EMORY L.J. 619, 621 (1983).

63. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980).

64. Cerruti, *supra* note 61, at 238.

founded in the structure and language of the Court's decision in *Richmond Newspapers*.[65]

The Court initially intended to answer the "narrow question . . . [of] whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution."[66] In the end, the Court would establish the foundation for the current state of public access to government information. The groundbreaking decision of *Richmond Newspapers* began in the context of a highly-publicized murder trial in Virginia.[67] Before the defendant's fourth trial for the same count, counsel for the defendant requested that the trial judge close the hearing to the public and the press amidst fears that members of the jury as well as potential witnesses were unfairly influenced by the media attention.[68] The trial judge relied on a Virginia statute that gave him the power to close the courtroom to the press and the public absent any objections from either party.[69] Several newspapers, including *Richmond Newspapers, Inc.*, objected to the order closing the hearing.[70] The Supreme Court granted certiorari in the case of *Richmond Newspapers* after the Supreme Court of Virginia refused to hear the case.[71]

Although the Court was in general agreement that the First Amendment provided a right of access for the press and the public, the Justices disagreed as to the scope and the significance of that right.[72] Only eight Justices participated

65. *See, e.g.*, Press-Enterprise Co. v. Sup. Ct., 478 U.S. 1 (1986) (Press-Enterprise II); Press-Enterprise Co. v. Sup. Ct., 464 U.S. 501 (1984) (Press-Enterprise I); Globe Newspaper Co. v. Sup. Ct, 457 U.S. 596 (1982).

66. *Richmond Newspapers*, 448 U.S. at 558.

67. *Id*. at 559.

68. *Id*. at 559-60.

69. *Id.* at 560. The trial judge was presumably referring to VA. CODE ANN. §19.2-266 (Supp. 1980), which states:

> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

VA. CODE ANN. §19.2-266. It is interesting to note that the Court did not decide whether or not the Virginia Code upon which the trial judge relied was in and of itself unconstitutional. *Richmond Newspapers*, 448 U.S. at 562 n.4. The Court maintained that the validity of the code "was not sufficiently drawn in question by appellants before the Virginia courts to invoke our appellate jurisdiction." *Id.*

70. *Id.* at 560.

71. *Richmond Newspapers*, 448 U.S. at 562-63.

72. *See id.* The Court was in general agreement despite a dissenting opinion written by Justice Rehnquist and multiple concurring opinions. A majority of justices agreed that the press and the public should have access to the hearing, but some justices thought that the right should originate in the Sixth rather than the First Amendment. *See id.*

in the case,[73] but the Court produced six separate opinions, each offering an independent rationale concerning the nature and scope of the First Amendment right of access. The two most notable opinions come from Justice Burger and Justice Brennan.[74] Both opinions are valuable and significant in terms of future Supreme Court jurisprudence regarding a First Amendment right of access to government information. While Justice Burger's opinion was the plurality opinion in *Richmond Newspapers*, Justice Brennan's concurring opinion proved to be more resilient in subsequent cases.

Justice Burger chose to decide the very narrow question of the press's right of access to criminal trials under the First Amendment.[75] Justice Burger considered the question presented in *Richmond Newspapers* as one of first impression for the Court, noting that the cases of *Gannett* and *Houchins* were factually distinguishable because *Richmond Newspapers* was limited to the First Amendment right of access to criminal proceedings.[76] The plurality of the Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"[77] This holding is primarily based on both the extensive history of public access to criminal trials as well as the people's right to gain information regarding the functioning of their government.[78]

Justice Burger placed primary emphasis on the long and continuous history of public and media access to criminal proceedings.[79] He stated, "[T]hroughout its evolution, the trial has been open to all who care to observe."[80] The First Amendment was enacted with this history of openness in mind.[81] Open criminal trials are essential to ensuring that criminal "proceedings [are] conducted fairly to all concerned, [and to] . . . discourage[]

73. Justice Powell did not participate in the consideration or the decision in this case. *Id.* at 581. Although Justice Powell did not participate in this particular decision, he undoubtedly supported a right of access under the First Amendment. In both *Gannett, Co. v. DePasquale*, 444 U.S. 368, 397 (1979) (Powell, J., concurring), and *Houchins v. KQED, Inc.*, 438 U.S. 1, 19 (1978) (Powell, J., dissenting), Powell supported a finding for a right of access to information from judicial proceedings. In fact, of the eight remaining Justices who sat for the *Richmond Newspapers* case, only Justice Rehnquist disagreed with the majority that the First Amendment provided a right of access to criminal trials. *See Richmond Newspapers*, 448 U.S. at 604.

74. Justice Marshall joined Justice Brennan in his well-written concurring opinion. *Id.* at 584.

75. *Id.* at 558.

76. *Id.* at 563-64.

77. *Id.* at 580 (footnote omitted) (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

78. *Richmond Newspapers*, 448 U.S. at 575.

79. *Id.* at 575.

80. *Id.* at 564.

81. *Id.* at 575.

perjury, the misconduct of participants, and decisions based on secret bias or partiality."[82] Additionally, open criminal trials provide therapeutic value to a community as a method of dealing with those who committed criminal acts.[83] Justice Burger noted:

> People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case . . . .[84]

In light of the positive historical background of open criminal trials, Justice Burger explained, presumptive openness is inherent and necessary to the American system of justice.[85]

The First Amendment prohibits the government from "abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the [g]overnment for a redress of grievances."[86] According to Justice Burger, the freedoms expressly guaranteed in the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[87] Essentially, the Court indicated that it is necessary to allow people to gain access to information in order to protect their right to free speech. Because of the long, uninterrupted history of access to trials, it is clear that criminal trials, especially the manner in which they are conducted, are an important aspect of the functioning of government.[88] "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."[89] The public's right of access, in Justice Burger's opinion, should also extend to the press because people gain most of their information through the media.[90] Denying access to the press would inhibit the people from exercising their First Amendment rights because they would be unable to gain information about their government. It is clear that the history of the openness of criminal trials was the defining factor in Justice Burger's analysis.[91]

82. *Id.* at 569.
83. *Richmond Newspapers*, 448 U.S. at 571.
84. *Id.* at 572.
85. *Id.* at 573.
86. U.S. CONST. amend. I.
87. *Richmond Newspapers*, 448 U.S. at 575.
88. *Id.*
89. *Id.*
90. *Id.* at 577 n.12.
91. Olson, *supra* note 10, at 477-78. *Compare* Globe Newspaper Co. v. Sup. Ct., 457 U.S. 596, 613 (1982) (Burger, C.J., dissenting) (arguing that, based on historical evidence, criminal trials for sexual offenses involving victims who are minors are traditionally closed) *with*

While Justice Burger's historical analysis is important to future Supreme Court jurisprudence regarding the right of access under the First Amendment, Justice Brennan's concurring opinion in *Richmond Newspapers* proved to be the more resilient.[92] Unlike Justice Burger, Justice Brennan advocated a more expansive view of the First Amendment right of access and chose not to narrow that right to criminal cases.[93] Justice Brennan asserted that the First Amendment plays a structural role in our society and is therefore an essential support of our republican system of government.[94] "Implicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open, but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed.'"[95] Essentially, Justice Brennan argued that the First Amendment must support the conditions that would lead to informed public debate in order to fulfill its structural role in the Constitution.[96] This line of reasoning supports open access to information to educate the public and foster informed public debate.

Justice Brennan acknowledged that an interpretation of the First Amendment along these lines would allow people to have access to a seemingly endless amount of government information.[97] He argued that "'the stretch of this protection is theoretically endless' [so] it must be invoked with discrimination and temperance."[98] Justice Brennan formulated a two-pronged "experience and logic" test as a practical limit to this structural principle.[99] A history, or "experience," of public access to a particular proceeding is vital because:

> [T]he case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. Such a tradition commands respect in part because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience.[100]

Richmond Newspapers, 448 U.S. at 575-80 (basing approval of First Amendment access to criminal trials on an uncontradicted common law history of access to proceedings).

92. *See, e.g.*, *Globe Newspaper*, 457 U.S. at 604-06. Justice Brennan, writing for the majority, formalized his structural interpretation of the First Amendment as well as his two-part "experience and logic" test. *Id.* He consistently cited to his concurring opinion in *Richmond Newspapers*. *Id.*

93. *Richmond Newspapers*, 448 U.S. at 586.

94. *Id*. at 587.

95. *Id*. (citation omitted) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

96. *See id*. at 587-88.

97. *Id*. at 588.

98. *Richmond Newspapers*, 448 U.S. at 588 (citation omitted) (quoting William Brennan, *Address*, 32 RUTGERS L. REV. 173, 177 (1979)).

99. *Id*. at 589.

100. *Id*.

If the First Amendment is to fulfill its structural role in providing the public with circumstances that support informed public debate, it seems clear that a favorable history of access would lend itself to that ideal. The second, or "logic," prong of the test is essential to limit access because practical considerations must be taken into account in each case before granting a right of access.[101] It is important to analyze the specific benefits gained from access to the proceeding in question.[102] "[W]hat is crucial [to the logic portion of the two-pronged analysis] in individual cases is whether access to a particular government process is important in terms of that very process."[103] With those words, Justice Brennan laid the foundation in support of a First Amendment right of access for subsequent right of access cases.

C. Richmond Newspapers *Gains New Ground: The Expansion of the Right of Access and the Addition of Strict Scrutiny*

Two years after *Richmond Newspapers*, the Court decided its next right of access case, *Globe Newspaper Co. v. Superior Court*.[104] Writing for the majority, Justice Brennan declared unconstitutional a Massachusetts law requiring judges to close the courtroom doors to the press and the public during the testimony of minor victims of sex offenses.[105] In *Globe Newspaper*, Justice Brennan relied on his structural theory of the First Amendment from *Richmond Newspapers* as the source of the right of access. He cited the *Richmond Newspapers* plurality for the proposition that "the 'expressly guaranteed freedoms' of the First Amendment 'share a common core purpose of assuring freedom of communication on matters relating to the functioning of government.'"[106] Justice Brennan then declared, "Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one."[107]

As noted in *Richmond Newspapers*, a right of access supported by a structural theory of the First Amendment could be seemingly endless.[108] Therefore, Justice Brennan returned to his two limiting principles, experience and logic, as practical limitations on that right.[109] Justice Brennan, in writing for the majority, clearly stated that First Amendment access to criminal trials

101. *Id.*
102. *Id.*
103. *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).
104. 457 U.S. 596 (1982).
105. *Id.* at 610-11.
106. *Id.* at 604 (quoting *Richmond Newspapers*, 448 U.S. at 575).
107. *Id.* at 604-05.
108. *Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring).
109. *Globe Newspaper*, 457 U.S. at 606.

does not depend on the context in which each particular case arises.[110] For example, the fact that the criminal case in *Globe Newspaper* involved a minor sex-crime victim was not important to the First Amendment analysis.[111] Rather, a First Amendment right of access exists only if the experience and logic analysis lends favorably to open access on a case-by-case basis.[112] Justice Brennan used historical evidence articulated in *Richmond Newspapers* to conclude that criminal trials have traditionally been open to the public.[113] Second, the Court concluded that the logic prong lends favorably to open proceedings because "the right of access to criminal trials plays a particularly significant role in the function[] of the judicial process and the government as a whole."[114] Therefore, Justice Brennan reaffirmed the application of the experience and logic analysis to determine that the media has a right of access to deportation proceedings.

The groundbreaking aspect of *Globe Newspaper* is the addition of the "strict scrutiny" portion of the analysis.[115] Although a court may determine that a fundamental right of access exists under the First Amendment, the right is not limitless.[116] The government may still restrict access if the restriction passes the Court's strict scrutiny analysis. The Court held that "it must be shown that the denial is necessitated by a compelling government interest and is narrowly tailored to serve that interest."[117] In *Globe Newspaper*, although the state's interest in protecting minor victims of sex offenses was compelling, the Court determined that the mandatory closure rule was not narrowly tailored to serve that interest.[118] The Court found blanket closures to be unnecessary because one could restrict access in a more narrow fashion by deciding on a case-by-case basis whether to close a particular hearing.[119]

Globe Newspaper is exceedingly important because it offered lower courts guidance in how they should weigh competing interests in right of access cases. "[A]fter *Globe* [*Newspapers*], many lower courts began using 'tradition' and 'contribution to function' as a two-pronged standard for determining whether there was a right of access to government proceedings or information."[120] The decision also established a strict scrutiny standard in order to assess government restrictions on access to information and

110. *Id.* at 605 n.13.
111. *Id.*
112. *Id.* at 608-09.
113. *Id.* at 605.
114. *Globe Newspaper*, 457 U.S. at 606.
115. *Id.* at 606-07.
116. *Id.* at 606.
117. *Id.* at 607.
118. *Id.* at 607-08.
119. *Globe Newspaper*, 457 U.S. at 608.
120. Hayes, *supra* note 10, at 1118.

proceedings that are protected by the First Amendment.[121] Therefore, the *Globe Newspaper* decision did much to refine the standard originally set forth in *Richmond Newspapers*. While relying on the reasoning set forth in his concurrence in *Richmond Newspapers*, Justice Brennan gained a majority and redefined the existing confines of the right of access to government proceedings and information.

Two years later, in *Press-Enterprise Co. v. Superior Court* (*Press-Enterprise I*), the Court found a First Amendment right of access to pretrial jury selection proceedings in a criminal case.[122] *Press-Enterprise I* involved a challenge to a trial judge's order to seal the transcript of jury selection proceedings in a criminal trial.[123] Although the case took place in the criminal context, this was the first time that the Court chose to extend the right of access outside the context of a criminal trial.[124] Despite the fact that the case involved a pre-trial jury selection proceeding rather than an actual criminal trial, the Court applied the two-prong *Richmond Newspapers* standard rather than *Houchins*.[125] The majority opinion notably did not include a discussion on the constitutional source of a right of access.[126] Assuming that *Richmond Newspapers* and *Globe Newspaper* had sufficiently established the existence of a First Amendment right of access, the Court turned directly to the experience and logic inquiry to determine if the right existed in the case of pretrial jury selection proceedings.[127] The Court articulated a history of access to pretrial jury selection dating back to the English common law and concluded that the long, continuous history of access to pretrial jury selection offered values similar to those present in a criminal trial.[128] An open pretrial proceeding offered "community therapeutic value" and an assurance that the government was functioning properly.[129]

After determining that the experience and logic portion of the test had been satisfied, the Court determined that the trial judge's order was not narrowly tailored to serve a compelling interest.[130] The Court also required that the proponent of the restriction provide specific, particularized findings supporting the narrow-tailoring requirement.[131] Although the government interest in closure was compelling in this case, the Court held that the trial judge's broad

121. *Id.* at 1118-19.
122. Press-Enterprise I, 464 U.S. 501, 513 (1984).
123. *Id.* at 504-05.
124. Hayes, *supra* note 10, at 1119.
125. *Press-Enterprise I*, 464 U.S. at 509-10.
126. *See id.* at 503.
127. *Id.* at 505-08.
128. *Id.*
129. *Id.* at 508-09.
130. *Press-Enterprise I*, 464 U.S. at 513.
131. *Id.* at 510.

order closing the transcript was not narrowly tailored to serve that interest.[132] The trial judge had failed to articulate specific findings to prove that the closure was narrowly tailored and also failed to consider alternatives to closure.[133] *Press-Enterprise I* indicated that the Court would take great care to protect First Amendment rights when they are found to exist and demonstrated the Court's willingness to apply the *Richmond Newspapers* standard outside the context of a criminal trial.

D. The Current State of the Right of Access

After the decision in *Press-Enterprise I*, the Court heard only one more case involving the right of access under the First Amendment. In *Press-Enterprise Co. v. Superior Court* (*Press Enterprise II*), the Court held that the press and the public had a right to attend preliminary hearings in criminal cases.[134] The case involved a challenge to an order closing transcripts of pretrial proceedings in highly-publicized cases.[135] Despite the trial judge's conclusion that much of the material included in the transcript was historical, the trial court concluded that the release of the transcript could jeopardize the defendant's right to a fair trial.[136] The media filed a challenge to the order in state court, claiming that the closure was a violation of their First Amendment rights.[137]

The Court applied the *Richmond Newspapers* standard to determine whether or not the First Amendment protected access to transcripts of preliminary hearings in criminal cases.[138] First, the Court determined that the history of access to preliminary hearings satisfied the experience portion of the test.[139] The significance of the *Press Enterprise II* opinion is its reliance on post-Bill of Rights history to support the experience portion of the *Richmond Newspapers* standard. Previous Supreme Court cases that dealt with the experience portion of the two-prong test had articulated historical evidence of openness dating back to English common law.[140] The Supreme Court had not yet articulated specific guidelines concerning the extent of history necessary to pass the experience portion of the test. If a proceeding lacked an extensive history of openness, it was uncertain whether the Court would consider the

132. *Id*. at 513.

133. *Id.*

134. Press-Enterprise II, 478 U.S. 1, 15 (1986).

135. *Id*. at 5.

136. *Id.*

137. *Id.*

138. *Id.* at 8.

139. *Press-Enterprise II*, 478 U.S. at 8-11.

140. *See, e.g.*, Globe Newspaper Co. v. Sup. Ct., 457 U.S. 596 (1982) (providing a history of openness to criminal proceedings dating back to the Norman Conquest); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (same).

experience sufficient. *Press-Enterprise II* suggested that a history of openness dating back to English common law was unnecessary when the Court relied upon nineteenth and twentieth century history to satisfy the experience portion of the test.[141] Following this decision, many believed that the history need not be as extensive as the history described in *Richmond Newspapers*.[142] Next, the Court concluded that the logic portion of the two-prong test had been satisfied because the traditional access to preliminary proceedings in criminal cases has had a positive effect on pretrial proceedings by acting as a safeguard against overzealous prosecution and providing an outlet for public observation.[143] After determining that both portions of the experience and logic test had been satisfied, the Court determined that the order failed under strict scrutiny.[144] Specifically, the Court concluded that the trial court failed to articulate valid reasons for closing the transcript.[145] The Court noted, "The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of that right."[146]

Following *Press-Enterprise II*, it became clear that a reviewing court must first determine whether the particular proceeding passes the experience and logic test articulated in *Richmond Newspapers*. If the reviewing court determines that the proceeding in question does not pass the experience and logic test, then the First Amendment does not support a right of access in that particular proceeding.[147] If, alternatively, the reviewing court determines that the proceeding does pass the experience and logic test, the public and the press will enjoy a qualified right of access to that particular proceeding. The government might still restrict access to a proceeding if it has a compelling reason and the limitation is narrowly tailored to serve that interest.[148]

Although *Press-Enterprise II* provided a definitive procedure by which right of access cases are to be determined, the Court's right of access cases left many open questions for the lower courts to consider. First, the Court never explicitly overruled the decision in *Houchins*.[149] Decisions following

141. *Press-Enterprise II*, 478 U.S. at 10-11.

142. *See, e.g.*, Olson, *supra* note 10, at 485-86.

143. *Press-Enterprise II*, 478 U.S. at 12-13.

144. *Id.* at 13-15.

145. *Id.* at 14-15.

146. *Id.* at 15.

147. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 589 (1980) (Brennan, J., concurring).

148. *Press-Enterprise II*, 478 U.S. at 13-14.

149. There is some evidence that the Court still considers *Houchins* to be good law. *Los Angeles Police Dep't v. United Reporting Corp.*, 528 U.S. 32 (1999), dealt with the constitutionality of a California statute that regulates the circumstances under which a publisher can obtain information. The press argued that the law violated the First Amendment because it limited access to government information. *Id.* at 34. The Court stated, "California could decide

Houchins failed to provide any guidance as to how to resolve the inconsistency in Supreme Court precedent.[150] Therefore, lower courts have struggled with the application of *Richmond Newspapers* and *Houchins*.[151] Second, "[t]he Court's ambiguity about the relative importance of the two prongs and its lack of guidance regarding the extent of the right or its application to proceedings beyond criminal trials has led to an inconsistent application of the doctrine."[152] The ambiguous nature of the two-part test is evidenced by the recent debate regarding access to deportation proceedings.

III. THE CIRCUITS SPLIT: *DETROIT FREE PRESS V. ASHCROFT AND NORTH JERSEY MEDIA GROUP, INC. V. ASHCROFT*

Following September 11, 2001, the United States government was forced to take a fresh look at immigration and national security. After only a few months, the government had arrested hundreds of foreign-born nationals on immigration charges.[153] The government was fearful that certain aliens "'might have connections with, or possess information pertaining to, terrorist activities against the United States.'"[154] Fearful that the deportation hearings would be used to reveal information regarding the investigation of the September 11 attacks as well as information regarding national security measures, the Attorney General argued that these hearings should be closed in "special interest" cases.[155] Pursuant to the order issued by the Attorney General, Judge Michael Creppy issued the Creppy Directive, ordering the broad closure of hundreds of special interest immigration hearings taking place throughout the United States.[156] Under this directive, Judge Creppy excluded

not to give out arrestee information at all without violating the First Amendment." *Id.* at 40. The Court used *Houchins* to support this proposition. *Id.*

150. *See, e.g.*, *Press-Enterprise II*, 478 U.S. 1; Press-Enterprise I, 464 U.S. 501 (1984); Globe Newspaper Co. v. Sup. Ct., 457 U.S. 596 (1982).

151. *See, e.g.*, N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

152. Olson, *supra* note 10, at 485.

153. Cole, *supra* note 2, at 961.

154. *N. Jersey Media Group*, 308 F.3d at 202 (quoting statement of Dale L. Watson, Federal Bureau of Investigation Executive Assistant Director for Counterterrorism and Counterintelligence).

155. *Detroit Free Press*, 303 F.3d at 705.

156. Cohen, *supra* note 3, at 1442. In fact, the Attorney General, in cooperation with the Office of the Chief Immigration Judge, closed every deportation hearing that posed even the slightest potential national security concern in connection with the September 11 attacks. *N. Jersey Media Group*, 303 F.3d at 202-03. These cases were closed to the public to keep our enemies from becoming aware of the cases that were closed. *Id.* at 203. By closing unrelated cases, Ashcroft determined that our enemies would be unable to deduce who was being deported in a closed hearing. *Id.* In *North Jersey Media Group*, Judge Becker went into great detail regarding the authority of, and the sources of authority for, the Creppy Directive. The Third Circuit stated:

the release of information concerning the trial and closed the doors to the public in hearings for special interest detainees.[157]

Several newspapers came forward shortly following the Creppy Directive claiming that the First Amendment protected access to deportation proceedings. Two cases reached the federal appellate level in both the Sixth and Third Circuits. While both Circuits determined that *Richmond Newspapers* was the appropriate analysis, the circuits disagreed as to whether or not the First Amendment protected access to deportation proceedings. Judge Keith, writing the majority opinion in *Detroit Free Press*, announced, "The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors."[158] Judge Becker, writing the opinion in *North Jersey Media Group*, declared, "We are keenly aware of the dangers presented by deference to the executive branch when constitutional liberties are at stake, especially in times of national crisis."[159] However, Judge Becker disagreed with Judge Keith, concluding that "[o]n balance, . . . we are unable to conclude that openness plays a positive role in special interest deportation hearings at a time when our nation is faced with threats of such profound and unknown dimension."[160] It is clear that fear of terrorism and national security concerns were key to Judge Becker's support of the Creppy Directive in *North Jersey Media Group*. While concern for the national security of our country is understandable and important, Supreme Court jurisprudence regarding the right of access clearly does not support a denial of First Amendment protection.

> The Immigration and Nationality Act charges the Attorney General with the "administration and enforcement" of "all [ ] laws relating to the immigration and nationalization of aliens." The Act authorizes the Attorney General to remove aliens from the United States for various reasons, including violation of the immigration laws. It also permits him to prescribe "such regulations . . . as he deems necessary for carrying out his authority," and provides for removal proceedings to be conducted by immigration judges within the Executive Branch "under regulations prescribed by the Attorney General."
>
> Pursuant to this authority, the Attorney General in 1964 promulgated a regulation governing public access to removal and other administrative hearings that has remained substantially unchanged. It mandates the closure of certain hearings, such as those involving abused alien children, and permits the closure of all other hearings to protect "witnesses, parties, or the public interest." The Creppy Directive was issued pursuant to this regulation.

N. Jersey Media Group, 308 F.3d at 202 n.1 (citations omitted) (quoting 8 U.S.C. §§ 1103(a), 1231 (1994) and 8 C.F.R. § 3.27 (2002)).

157. Susan Sachs, *Ashcroft Petitions Justices For Secrecy in Deportations*, N.Y. TIMES, June 22, 2002, at A9.

158. *Detroit Free Press*, 303 F.3d at 683.

159. *N. Jersey Media Group*, 308 F.3d at 220.

160. *Id.*

A. *Detroit Free Press v. Ashcroft*

Several local newspapers and members of the public were denied access to Rabih Haddad's deportation hearings after Immigration Judge Elizabeth Hacker announced the closure of the hearing.[161] Haddad, several newspapers and Congressman John Conyers (collectively known as "the newspapers") filed complaints for injunctive and declaratory relief claiming that the Creppy Directive's blanket closure of all deportation proceedings in special interest cases violated the First Amendment.[162] The District Court granted the newspapers' motion, finding that the First Amendment protected access to deportation proceedings.[163] The court found a qualified First Amendment right based on an application of the *Richmond Newspapers* standard and held that the Creppy Directive unduly restricted protected access because it was not narrowly tailored to serve the interests of national security.[164]

1. Applicability of Richmond Newspapers

The government considered the fact that the Supreme Court failed to overturn its decision in *Houchins* as an opportunity to argue before the Court of Appeals against application of the *Richmond Newspapers* standard.[165] The Attorney General argued that the *Richmond Newspapers* standard should not extend to deportation hearings because they are entirely administrative in nature.[166] In the government's view, the Supreme Court's jurisprudence conferring a right of access had been limited to judicial proceedings.[167] In rejecting this argument, Judge Keith found that, although they might be administrative, deportation hearings have quasi-judicial characteristics.[168]

There is ample evidence that the Supreme Court will look to the adjudicative aspects of a particular administrative proceeding in reaching its

161. *Detroit Free Press*, 303 F.3d at 684.

162. *Id.*

163. *See* Detroit Free Press v. Ashcroft, 195 F. Supp. 2d 937, 944 (E.D. Mich. 2002).

164. *Id.* at 947.

165. *Detroit Free Press*, 303 F.3d at 694.

166. *Id.*

167. *Id*.

168. *Id*. Judge Keith, writing for the Sixth Circuit, pointed out that *Houchins* might no longer be a viable standard. First, the decision in *Houchins* was not a majority, but rather a plurality, decision for the Court. *Id.* Only seven of the nine justices took part in the decision, and therefore it cannot be said that a majority either accepted or rejected the standard articulated in *Houchins*. *Id.* at 694 n.10. Furthermore, the standard articulated in *Richmond Newspapers* has sufficiently addressed all of the concerns stated in *Houchins* regarding a First Amendment right of access. *Id.* at 695. Judge Keith argued against the viability of *Houchins* despite the Supreme Court's prior reliance on the case. *Id.* However, Judge Keith maintained that *Houchins* might correctly be applied in other cases based on different facts and circumstances. *Id*. at 694-95.

decisions regarding administrative proceedings.[169] For instance, the Sixth Circuit cited the Supreme Court's recent decisions in *Sims v. Apfel*[170] and *Federal Maritime Commission v. South Carolina State Ports Authority*[171] in support of this proposition.[172] In *Sims*, the Supreme Court held that a social security recipient need not exhaust all issues at the administrative hearing to preserve them for judicial review.[173] In the Court's view, proceedings before an administrative agency are not adversarial in nature and therefore are not necessarily subject to the same standards governing adversarial proceedings.[174] In contrast, in *Federal Maritime Commission*, the Court "held that state sovereign immunity bars an administrative agency from adjudicating complaints filed by a private party against a non-consenting state because . . . such administrative proceedings bore a striking resemblance to civil litigation."[175] Therefore, the bar against suing a state under the Eleventh Amendment was extended to administrative proceedings because the Court found that they were very much like judicial proceedings.[176] The Sixth Circuit also cited one of its own prior cases, *United States v. Miami University*,[177] which held "that there was no First Amendment right to access a university's student disciplinary board proceedings."[178] In that case, the Sixth Circuit based its conclusion on the fact that the administrative proceedings that were at issue in the case were not judicial in nature because they often did not embody the traditional notions of fair play.[179] "'[S]tudent disciplinary proceedings do not "afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify

169. *See id.* at 695-96. The court rejected the idea that a line was drawn between administrative proceedings and judicial proceedings. *Id.* at 695. First of all, the Supreme Court has applied the *Richmond Newspapers* standard outside the context of judicial proceedings in *Press-Enterprise II*, 478 U.S. 1 (1986), *Press-Enterprise I*, 464 U.S. 501 (1984), and *Globe Newspaper Co. v. Sup. Ct.*, 457 U.S. 596 (1982). *See Detroit Free Press*, 303 F.3d at 695-96. The Sixth Circuit and other federal courts have applied this standard outside the context of judicial proceedings as well, and in some cases, the other federal courts have applied this standard to administrative proceedings. *Id.* at 695. Furthermore, the court does not believe that distinctions should be drawn between judicial and non-judicial proceedings for fear that it would allow the legislature to "artfully craft information out of the public eye." *Id.* at 696.

170. 530 U.S. 103 (2000).

171. 535 U.S. 743 (2002).

172. *Detroit Free Press*, 303 F.3d at 696-97.

173. *Sims*, 530 U.S. at 112.

174. *Id.* at 109-111.

175. *Detroit Free Press*, 303 F.3d at 697 (citing *Fed. Mar. Comm'n*, 535 U.S. at 756-61).

176. *See id.*

177. 294 F.3d 797 (6th Cir. 2002).

178. *Detroit Free Press*, 303 F.3d at 697 (citing *Miami Univ.*, 294 F.3d at 824).

179. *Id.*

his version of the incident.'"[180] The Sixth Circuit relied on this precedent to support the contention that *Richmond Newspapers* should apply to deportation hearings because the hearings are quasi-judicial.[181]

The characteristics of deportation proceedings support the contention that they are in fact quasi-judicial proceedings.[182] The government must issue a "Notice to Appear," a charging document served to the deportee under circumstances similar to those required for complaints in judicial proceedings.[183] Additionally, respondents in deportation proceedings may offer affirmative defenses, have a right to habeas corpus relief, have a right to be represented by counsel, and have a right to be present at the hearing.[184] Additionally, respondents have the right to examine and object to evidence used against them, present evidence on their own behalf, and cross-examine witnesses presented by the government.[185] The role of immigration judges provides further evidence of the judicial nature of deportation proceedings. Although immigration judges are not Article III judges,[186] the role that they play in presiding over immigration hearings is very similar to the way in which Article III judges preside over criminal and civil proceedings. Most importantly, the immigration judge does not participate in the investigative aspects of the administrative proceedings; rather, the immigration judge is to serve an impartial role in presiding over deportation proceedings.[187] Deportation proceedings are adjudicative, quasi-judicial proceedings and should be afforded First Amendment protection.

2. Application of the Two-Pronged *Richmond Newspapers* Test

The right of access under the First Amendment is a qualified right that is limited by practical considerations of experience and logic.[188] Relying on *Richmond Newspapers*, the central question in both *North Jersey Media Group* and *Detroit Free Press* is therefore whether or not deportation hearings carry a

180. *Id.* (quoting *Miami Univ.*, 294 F.3d at 822 (quoting Gross v. Lopez, 419 U.S. 565, 583 (1975))).

181. *See id.* at 698.

182. *Id.*

183. *Detroit Free Press*, 303 F.3d at 698.

184. *Id.* at 698-99.

185. *Id.* at 699.

186. *See* U.S. CONST. art. III, § 1. In addition to granting Congress the power to create lower federal courts, Article III of the United States Constitution creates the Supreme Court of the United States. *Id.* Article III judges are appointed to life terms under the obligations of that article of the Constitution. *Id.* Immigration judges are appointed by the Executive Branch, but do not preside over a federal court created by Congress; instead, they preside over an administrative agency hearing. *See Detroit Free Press*, 303 F.3d at 699.

187. *Detroit Free Press*, 303 F.3d at 699.

188. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 588-89 (1980).

"tradition of accessibility" and whether that tradition has had a favorable impact on society.[189]

a. The Experience Prong

In *Detroit Free Press*, the court concluded that there is a presumptive right of access under the experience and logic test.[190] *Richmond Newspapers* requires a reviewing court to consider whether openness has proven to be a favorable experience.[191] Therefore, Judge Keith considered "'whether the place and process have historically been open to the press and general public.'"[192] The newspapers arguing in support of access maintained that deportation proceedings had enjoyed a long, uncontradicted history of open access.[193] The government attacked the newspapers' argument that deportation hearings have been presumptively open.[194] Specifically, the government argued: (1) that the history of openness of deportation hearings must date back to the common law tradition, and (2) that even if the court decided that the history of openness need not date back to the common law, deportation proceedings have not enjoyed the unambiguous presumption of openness necessary to satisfy *Richmond Newspapers*.[195]

The government argued that *Richmond Newspapers* requires a common law history of openness in order to satisfy the historical prong of the experience test.[196] Judge Keith relied on *Press Enterprise II* and concluded that common law history was unnecessary.[197] "[A]lthough historical context is

189. *See* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002); *Detroit Free Press*, 303 F.3d 681. This is often referred to as the experience and logic test. *See* Globe Newspaper Co. v. Sup. Ct., 457 U.S. 596, 606 (1982). The government in both *Detroit Free Press* and *North Jersey Media Group* argued that the federal government should receive great deference in control over its borders. *See N. Jersey Media Group*, 308 F.3d at 202; *Detroit Free Press*, 303 F.3d at 685-87. More specifically, the Court has declared that "[i]mmigration includes substantive laws over who may enter or remain in this country, laws governing procedural aspects of immigration hearings, and regulations on the mechanics of deportation." *Detroit Free Press*, 303 F.3d at 686-687. As indicated in the case of *Zadvydas v. Davis*, 533 U.S. 678 (2001), throughout its jurisprudence in the area of immigration, the Supreme Court has treated the authority that Congress holds differently with regard to procedural laws than it does with regard to substantive laws. "The Supreme Court has always interpreted the Constitution meaningfully to limit non-substantive immigration laws, without granting the Government special deference." *Detroit Free Press*, 303 F.3d at 687-688. Therefore, the court in *Detroit Free Press* refused to defer to the Attorney General's discretion regarding our national borders. *Id.* at 688.

190. *Detroit Free Press*, 303 F.3d at 700.

191. *See Richmond Newspapers*, 448 U.S. at 588 (Brennan, J., concurring).

192. *Detroit Free Press*, 303 F.3d at 700 (quoting Press-Enterprise II, 478 U.S. 1, 8 (1986)).

193. *See id.*

194. *Id.*

195. *Id.* at 700-704.

196. *Id.* at 700.

197. *Detroit Free Press*, 303 F.3d at 700.

important, a brief historical tradition might be sufficient to establish a First Amendment right of access where the beneficial effects of access to that process are overwhelming and uncontradicted."[198] Although deportation hearings lack a common law tradition of openness, the court held the history of openness sufficient to satisfy the experience prong of the *Richmond Newspapers* test.[199]

Next, Judge Keith turned his attention to the history of openness in deportation proceedings. The general policy toward deportation proceedings has traditionally been one of openness.[200] Administrative proceedings have evolved to embrace open hearings in most cases and particularly in the case of deportation hearings.[201] He noted that "[s]ince 1965, INS regulations have explicitly required deportation proceedings to be presumptively open."[202] Congress has repeatedly enacted statutes that explicitly close exclusion hearings, but leave deportation proceedings open.[203] The government argued that the closure of exclusion hearings and the openness of deportation proceedings indicated that Congress sought to give the Immigration and Naturalization Service (INS) discretion over closure of deportation hearings.[204] Judge Keith disagreed, stating that "it would have been easy enough for Congress expressly to state that the Attorney General had such discretion with respect to deportation hearings. But it did not."[205] The Immigration and Nationality Act is full of examples that specifically grant the Attorney General discretion.[206] It is clear that in choosing not to grant the Attorney General the right to close deportation hearings to the public, Congress concluded that the hearings should be open to the public.[207] Judge Keith reasoned that a history of openness that dates back to the creation of the deportation proceeding satisfied the *Richmond Newspapers*' experience prong of the test.[208]

b. The Logic Prong

When looking at the substantive question of whether or not access to deportation proceedings plays a positive role, the Sixth and the Third Circuits disagree as to the appropriate outcome. Judge Keith concluded that public

198. *Id.* at 701.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Detroit Free Press*, 303 F.3d at 701.
203. *Id.*
204. *Id.*
205. *Id.* at 702.
206. *Id.*
207. *Detroit Free Press*, 303 F.3d at 702.
208. *Id.* at 700-03.

access to deportation proceedings has had a positive effect.[209] He stated, "First, public access acts as a check on the actions of the Executive by assuring us that proceedings are conducted fairly and properly."[210] In light of the unlimited authority that the government does exercise in relation to deportation hearings, public access must act as a check to any abusive government practice.[211] Second, public access will ensure that government "does its job properly."[212] Openness and public access will prevent mistakes and ensure that the government acts formally and carefully in order to prevent public disapproval.[213] It is likely that public access would work to ensure the proper execution of this country's immigration laws and deportation proceedings.[214] Third, openness of deportation proceedings is necessary for "therapeutic" purposes, as an outlet for community concerns, hostility and emotions, especially after September 11, 2001.[215] Judge Keith further stated that "openness enhances the perception of integrity and fairness. 'The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed . . . .'"[216] Finally, he noted that "public access helps ensure that 'the individual citizen can effectively participate in and contribute to our republican system of self-government.'"[217] Access to deportation proceedings informs the public of the government's actions directly.[218] "Direct knowledge of how . . . government is operating enhances the public's ability to affirm or protest government's efforts. . . . When government selectively chooses what information it allows the public to see, it can become a powerful tool for deception."[219] After evaluating the considerable evidence of the positive impact of access, the court concluded that the logic portion of the inquiry was satisfied.[220]

Application of the *Richmond Newspapers* standard to deportation proceedings led Judge Keith to conclude that deportation proceedings enjoy qualified First Amendment protection.[221] While the First Amendment will now provide protection for members of the public seeking access to a deportation proceeding, this right is not absolute. The government may still

209. *Id.* at 703.
210. *Id.* at 703-04.
211. *Id.* at 704.
212. *Detroit Free Press*, 303 F.3d at 704.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* (quoting Press-Enterprise I, 464 U.S., 501, 508 (1984)).
217. *Detroit Free Press*, 303 F.3d at 704 (quoting Globe Newspaper Co. v. Sup. Ct., 457 U.S. 596, 604 (1982)).
218. *Id.* at 704-05.
219. *Id.*
220. *Id.* at 705.
221. *Id.*

restrict access to protected information if the limitation passes the strict scrutiny analysis.

B. Application of the Strict Scrutiny Standard in the Sixth Circuit

Under the applicable strict scrutiny analysis, when access to information is protected by the First Amendment, the government may not restrict that access unless there is a compelling state interest and the restriction is narrowly tailored to serve that interest.[222] Additionally, Supreme Court jurisprudence demands that any compelling government interest be "'articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'"[223] In order for any restriction on the right of access to pass scrutiny, both of these prongs must be satisfied.[224] Judge Keith determined that, although the government interest in national security is compelling, the Creppy Directive was not narrowly tailored to serve national security interests; further, the government had not provided any particularized findings to that end.[225]

1. A Compelling Government Interest

The government argued that the "'[c]losure of removal proceedings in special interest cases is necessary to protect national security by safeguarding the Government's investigation of the September 11 terrorist attack and other terrorist conspiracies.'"[226] More specifically, the government stated that any information including the names of the special interest detainees as well as the place and date of arrest satisfies the compelling government interest requirement.[227] Public disclosure could cause any ongoing investigation to be disrupted because such disclosure would alert terrorist organizations of the arrests.[228] This could lead to intimidation of potential witnesses and might deter the detainees from cooperating, both of which would hamper the government's investigation.[229] Furthermore, public access could reveal the direction of the investigation or could invite terrorist organizations to interfere with pending proceedings by creating false evidence intended to mislead the government.[230] If public access were allowed in deportation hearings in special cases, "'[b]its and pieces of information that may appear innocuous in isolation,' but used by terrorist groups to help form a 'bigger picture' of the

222. *Detroit Free Press*, 303 F.3d at 705 (citing *Globe Newspaper*, 457 U.S. at 606-07).
223. *Id.* (quoting Press-Enterprise II, 478 U.S. 1, 10 (1986)).
224. *Id*.
225. *Id.*
226. *Id*. (quoting U.S. Government Brief at 46).
227. *Detroit Free Press*, 303 F.3d at 705-06.
228. *Id.*
229. *Id.*
230. *Id.* at 706.

Government's terrorism investigation, would be disclosed."[231] There is an additional fear of the stigma that the special interest detainees would experience if their names were divulged to the public, even if they were found not to have any connection to terrorism.[232] The Sixth Circuit deferred to the judgment of the government regarding its ongoing investigation in the realm of terrorism.[233] The Court stated, "These agents are certainly in a better position to understand the contours of the investigation and the intelligence capabilities of terrorist organizations."[234]

2. Narrow Tailoring

As mentioned earlier, the government must prove both a compelling interest and narrow tailoring to pass strict scrutiny.[235] Specific findings must be produced on the record so that "a reviewing court can determine whether closure was proper and whether less restrictive alternatives exist."[236] In *Detroit Free Press*, Judge Keith noted that "[t]he Government offers no persuasive argument as to why the Government's concerns cannot be addressed on a case-by-case basis."[237] He stated that in camera review before the closure of any particular proceeding would likely provide as much security as the Creppy Directive.[238] The government had argued that sensitive information would be revealed if the closure were limited to a case-by-case basis.[239] Essentially, the government feared that any release of information, no matter how unimportant it might seem at the time, might give terrorist groups some insight.[240] Judge Keith contended that this information is already capable of being released to the public by the detainees themselves, whose speech the government is unable to restrict; therefore, he concluded, the names of various detainees are likely to be released anyway.[241] Further, the government has a wide range of control over deportation proceedings and need only release very little information in order to prove its case.[242] Despite the government's substantial concerns, Judge Keith concluded that the government failed to provide particularized findings that the Creppy Directive was

231. *Id.* (quoting affidavit submitted in support of U.S. Government's position).
232. *Detroit Free Press*, 303 F.3d at 706.
233. *Id.* at 707.
234. *Id.*
235. *Id.* at 705.
236. *Id.* at 707.
237. *Detroit Free Press*, 303 F.3d at 707.
238. *See id.* at 708.
239. *Id.*
240. *Id.*
241. *Id.*
242. *Detroit Free Press*, 303 F.3d at 709.

narrowly tailored.[243] He concluded, "[W]e do not believe speculation should form the basis for such a drastic reduction of the public's First Amendment rights."[244] As a result, the court upheld the District Court's injunction on the imposition of the Creppy Directive in Haddad's deportation case, finding that there is a presumptive right of openness and that the standard of strict scrutiny had not been satisfied in this case.[245]

IV. *NORTH JERSEY MEDIA GROUP, INC. V. ASHCROFT*

Like *Detroit Free Press*, the dispute in *North Jersey Media Group* involved a First Amendment challenge to the Creppy Directive. After the *New Jersey Law Journal* and *Herald News* were repeatedly denied access to information about deportation proceedings pending in Newark's Immigration Court, the newspapers filed an action claiming a violation of their First Amendment rights.[246] The District Court followed the two-part *Richmond Newspapers* test and found that the First Amendment provides a qualified right of access to deportation proceedings.[247] The court concluded that the presumptive right of access as well as the innumerable similarities between judicial proceedings and deportation proceedings supported the existence of that right.[248] The District Court also determined that the Creppy Directive was unconstitutional because it called for a blanket closure of the proceedings and was not narrowly tailored to serve the interests of national security.[249] The government subsequently appealed the District Court's decision, and the Third Circuit granted expedited review of the government's appeal but refused to grant a stay of the District Court's injunction.[250]

243. *Id.* at 710.

244. *Id.* at 709. The government contended that it has in place an interim rule that restrains the deportees from communicating information for an "indefinite period of time." *Id.* at 708. "The interim rules provide that 'protective orders issued under this section shall remain in effect *until vacated by the Immigration Judge*.' It also provides that '(a)ny information submitted subject to the protective order . . . shall remain under seal as part of the administrative record.'" *Id.* (citations omitted) (emphasis added by court) (quoting 8 C.F.R. § 3.46(f)(3) (2002)). However, Judge Keith contended that this type of order is completely impermissible to the extent that it is "indefinitely restrain[ing] a deportee's ability to divulge all information, including information obtained independently from the deportation proceedings." *Id.* This might have First Amendment implications of its own. *See id.*; *see also* Butterworth v. Smith, 494 U.S. 624 (1990).

245. *Detroit Free Press*, 303 F.3d at 710.

246. *See* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 203-04 (3d Cir. 2002).

247. N. Jersey Media Group, Inc. v. Ashcroft, 205 F. Supp. 2d 288, 301 (D.N.J. 2002).

248. *Id.*

249. *Id.* at 302.

250. *N. Jersey Media Group*, 308 F.3d at 204.

A. The Richmond Newspapers Standard in the Third Circuit

Like the Sixth Circuit, the Third Circuit chose to apply the *Richmond Newspapers* standard rather than that enunciated in *Houchins*.[251] Judge Becker concluded, "Given that a majority of the Supreme Court has applied the *Richmond Newspapers* framework to pretrial proceedings and *voir dire* examinations, that approach clearly is not confined to the criminal trial itself, although each of the Supreme Court's applications has arisen in the criminal context."[252] Before *North Jersey Media Group*, the Third Circuit had traditionally applied the *Richmond Newspapers* standard outside judicial proceedings. For instance, the Third Circuit applied the *Richmond Newspapers* analysis to the question of whether there is a right of public access to records of a state environmental agency.[253] Despite the fact that the case involved an administrative agency, the decision ultimately rested on the *Richmond Newspapers* test.[254] Judge Becker stated, "[I]n this Court, *Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings, including removal."[255] Therefore, the Third Circuit, like the Sixth Circuit, deemed the *Richmond Newspapers* standard to be the appropriate analysis under which to determine whether access to deportation proceedings enjoy First Amendment protection.

B. Application of the Two-Part Richmond Newspapers Test

Unlike Judge Keith, Judge Becker determined that access is not constitutionally protected. The court concluded that the broken, ambiguous history of access to deportation proceedings did not satisfy the *Richmond Newspapers* test.[256] The court could have chosen to end its inquiry there, but chose instead to comment on the inadequacy of the logic prong as well.[257] Judge Becker stated, "We also conclude that under a logic inquiry properly acknowledging both community benefit *and* potential harms, public access does not serve a 'significant positive role' in deportation hearings."[258] In finding that deportation proceedings failed on both the logic and experience prongs of the *Richmond Newspapers* test, the Third Circuit unquestionably determined that the First Amendment does not protect access to deportation proceedings.

251. *Id.* at 208-09.
252. *Id.* at 206.
253. *Id*. at 208.
254. *Id.*
255. *N. Jersey Media Group*, 308 F.3d at 208-09.
256. *Id.* at 209.
257. *Id.*
258. *Id.*

1. The Experience Prong

Judge Becker concluded that the period of history necessary to satisfy the experience prong of the *Richmond Newspapers* analysis is an open question to be decided in favor of a long, uninterrupted history in cases involving deportation proceedings.[259] He stated, "The Newspapers contend, quite correctly, that at least within the geographic confines of the Third Circuit, a showing of openness at common law is not required."[260] Although the court agreed that a showing of common-law history is not required, the court would not ignore the experience portion of the *Richmond Newspapers* inquiry in cases where history is "ambiguous or lacking."[261] The court noted that "[r]elaxing the *Richmond Newspapers* experience requirement would lead to perverse consequences" in deportation proceedings.[262] It is the Third Circuit's belief that there needs to be a more rigorous experience test in order to protect administrative agencies' ability to promulgate their rules.[263] Becker argued that administrative agencies should be able to conduct their businesses behind closed doors in order to insure that they operate more smoothly.[264] He wrote, "By insisting on a strong tradition of public access in the *Richmond Newspapers* test, we preserve administrative flexibility and avoid constitutionalizing ambiguous, and potentially unconsidered, executive decisions."[265]

With this in mind, Judge Becker required extensive historical evidence to support openness in deportation proceedings.[266] He noted, "While we acknowledge a current presumption of openness in most deportation proceedings, we find that this presumption has neither the pedigree nor uniformity necessary to satisfy the *Richmond Newspapers*'s first prong."[267] The Third Circuit found that there is extensive and compelling evidence that the Framers rejected an unqualified right of access to the functions of the political branches.[268] First, the court noted that the first Congress did not open its proceedings and floor hearings to the public.[269] Even today the majority of Congressional activity takes place behind closed doors.[270] As a second example of a closed administrative proceeding, the court stated that, because of

259. *Id.* at 216.
260. *N. Jersey Media Group*, 308 F.3d at 213.
261. *Id.*
262. *Id.* at 215.
263. *Id.* at 216.
264. *Id.*
265. *N. Jersey Media Group*, 308 F.3d at 216.
266. *Id.* at 214.
267. *Id.* at 209.
268. *Id*.
269. *Id.* at 209-10.
270. *N. Jersey Media Group*, 308 F.3d at 210.

the sensitive information released during the process, social security proceedings are closed to the public regardless of the impact.[271] The government provided examples of more then a dozen administrative proceedings that are presumptively closed to the public.[272]

The Third Circuit disagreed with the Sixth Circuit's conclusion that deportation proceedings have traditionally been open to the public and press.[273] The court stated, "[B]ased on both Supreme Court and Third Circuit precedents, the tradition of open deportation hearings is too recent and inconsistent to support a First Amendment right of access."[274] The court rejected the newspaper's argument that Congress's practice of closing exclusion proceedings while refraining from closing deportation proceedings indicated that Congress intended that these proceedings remain presumptively open to the public.[275] The court asserted that there is evidence to indicate specifically that deportation proceedings have been closed to the public.[276] The government had often held deportation proceedings in areas that are traditionally closed off to the public such as prisons, hospitals, and even private homes.[277] Hearings involving abused alien children are closed to the public by regulation.[278] The Third Circuit concluded that without the "gloss of history" gained only by an extensive history of access, deportation proceedings were unable to satisfy the experience portion of the *Richmond Newspapers* test.[279] Furthermore, the Third Circuit maintained that historical access to deportation proceedings did not lend itself to the favorable judgment of experience.[280] In light of this evidence, Judge Becker concluded that the experience portion of the *Richmond Newspapers* standard had failed in the context of deportation proceedings.

2. The Logic Prong

The Third Circuit considered the logic prong ineffective when used in the *Richmond Newspapers* standard. The court noted:

271. *Id.*

272. *See id.* Deportation proceedings, in any and all forms, were notably absent from this list.

273. *Id.* at 211.

274. *Id.*

275. *N. Jersey Media Group*, 308 F.3d at 212. "Justice Department regulations provide explicitly that '[a]ll hearings, other than exclusion hearings, shall be open to the public except that . . . [f]or the purpose of protecting . . . the public interest, the Immigration Judge may limit attendance or hold a closed hearing.'" *Id.* (quoting 8 C.F.R. § 3.27(b) (2002)).

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 216.

280. *N. Jersey Media Group*, 308 F.3d at 216.

> [I]n the jurisprudence developed thus far, the logic prong does not appear to do much work in the *Richmond Newspapers* approach, for we have not found a case in which a proceeding passed the experience test through its history of openness [and] yet failed the logic test by not serving community values.[281]

To rectify this problem, the Third Circuit chose to consider both the negative and positive implications of access. Judge Becker argued that this approach would help the logic prong gain more force in the *Richmond Newspapers* analysis.[282]

With the negative consequences of access in mind, the gloss of history must have had a favorable impact on that particular proceeding.[283] Judge Becker ultimately agreed with Judge Keith that access to deportation proceedings has had a favorable impact on the process. However, Judge Becker concluded that the negative impact of access far outweighs the favorable impact.[284] The Third Circuit has identified six values typically served by openness:

> "[1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the judicial system; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the judicial process to public scrutiny; [5] enhancement of the performance of all involved; and [the] [6] discouragement of perjury."[285]

While Judge Becker noted that access to deportation proceedings would serve as a positive influence, he concluded that the threat to national security was too great.[286] He cautioned, "First, public hearings would necessarily reveal sources and methods of investigation . . . which . . . allows a terrorist organization to build a picture of the investigation."[287] Second, deportation proceedings might reveal how a given deportee entered our country illegally.[288] He stated that "putting entry information into the public realm regarding all 'special interest cases' would allow the terrorist organization to see patterns of entry, what works and what doesn't."[289] Third, there is a fear that open deportation proceedings will reveal what evidence the government lacks in its

281. *Id.* at 202.
282. *Id.* at 217.
283. *Id.*
284. *Id.*
285. *N. Jersey Media Group*, 308 F.3d at 217 (quoting U.S. v. Simone, 14 F.3d 833, 839 (3d Cir. 1994)).
286. *Id.*
287. *Id.* at 218.
288. *Id.*
289. *Id.*

war against terrorism.[290] "Fourth, if a terrorist organization discovers that a particular member is detained, or that information about a plot is known, it may accelerate the timing of the planned attack, thus reducing the amount of time the government has to detect and prevent it."[291] Fifth, a terrorist group that gains knowledge about a particular proceeding might be able to create false information and evidence.[292] Access would slow investigations and undermine the government's efforts against terrorism.[293] Sixth, detainees' personal safety might become an issue if their identity is made known to the public.[294] The court concluded that national security interests at stake in the case of deportation proceedings clearly outweigh the positive attributes associated with access.[295]

Judge Becker decided that deportation proceedings did not satisfy the *Richmond Newspapers*' experience and logic test, and therefore, the First Amendment does not protect public access to deportation proceedings.[296] Judge Keith, on the other hand, determined that deportation proceedings did pass the *Richmond Newspapers*' experience and logic test, and therefore, the hearings enjoy qualified First Amendment protection.[297] In his view, the government may close deportation proceedings without violating the First Amendment if its methods are narrowly tailored; importantly, the Creppy Directive is far too broad and therefore is unconstitutional.[298]

V. ANALYSIS

The two-part *Richmond Newspapers* standard has been left in a state of ambiguity and confusion by the Supreme Court. In approaching right of access cases, lower courts have failed to apply the *Richmond Newspapers* standard consistently.[299] *Detroit Free Press* and *North Jersey Media Group* illustrate this difficulty in their inability to agree on the relative importance of the two factors. While both Circuits applied the two-pronged *Richmond Newspapers* standard, each judge's application of that standard led to divergent conclusions. These differences of opinion indicate a larger problem with the *Richmond Newspapers* standard. Without further guidance from the Supreme Court, each court has enjoyed significant flexibility in the application of the

290. *N. Jersey Media Group*, 308 F.3d at 218.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *N. Jersey Media Group*, 308 F.3d at 220.
296. *Id.* at 209.
297. Detroit Free Press v. Ashcroft, 303 F.3d 681, 710 (6th Cir. 2002).
298. *Id.*
299. *See, e.g.*, *N. Jersey Media Group*, 308 F.3d 198; *Detroit Free Press*, 303 F.3d 681.

standard. Increased judicial discretion becomes a problem during times of stress when external pressure might affect decision-making.[300]

The Sixth Circuit applied the *Richmond Newspapers* two-pronged test correctly when Judge Keith concluded that the public enjoys a qualified First Amendment right of access to deportation proceedings. The experience and logic portions of the test are satisfied with respect to deportation proceedings when one considers the test in the context in which it was created. The First Amendment will support a right of access in order to fulfill its core purpose of informed public debate.[301] The experience and logic test was considered a practical limitation on that right.[302] A reviewing court should evaluate the history of access to determine if access implies the favorable judgment of experience to that particular proceeding.[303] Equally important is the reviewing court's approach to the logic portion of the two-pronged test. *Detroit Free Press* accurately portrays the way that the *Richmond Newspapers* test should be applied.

A. Richmond Newspapers *Should Be Applied to Deportation Proceedings*

In his concurring opinion in *Richmond Newspapers*, Justice Stevens wrote, "Today . . . for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech . . . protected by the First Amendment."[304] Although it is clear that the Supreme Court issued a watershed opinion in *Richmond Newspapers*, it failed to take the important step of overturning past cases that refused to grant such a right. *Houchins* and *Richmond Newspapers* are inconsistent with one another and the Court has failed to provide guidance on how the conflict should be resolved. The distinction is undeniably important. If the reviewing court in either *North Jersey Media Group* or *Detroit Free Press* had chosen to apply the standard articulated in *Houchins*, there is no question that the public and the press would not have access to deportation proceedings. However, both Judge Keith and Judge Becker correctly concluded that the standard articulated in the *Richmond Newspapers* opinion should apply to the present question of access to deportation proceedings. This is true for two reasons: (1) Supreme Court jurisprudence supports the application of *Richmond Newspapers* outside the context of a criminal trial, and (2) *Detroit Free Press* and *North Jersey Media Group* are factually similar to the *Richmond Newspapers* decision and can be distinguished from *Houchins*.

300. Olson, *supra* note 10, at 488.
301. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980).
302. *Id.* at 589 (Brennan, J., concurring).
303. *Id.* (Brennan, J., concurring).
304. *Id.* at 583.

Although the Supreme Court has not specifically addressed the question of whether the First Amendment protects access outside the context of a criminal trial, *Richmond Newspapers* and its progeny support the expansion of protection. Justice Brennan has consistently advocated an expansive view of First Amendment protection.[305] A structural interpretation of the First Amendment supports access to government information to ensure that public debate of important issues will be informed.[306] The court should not focus on the type of proceeding at issue in a particular dispute, but rather on whether access to that proceeding or information would support informed public debate.[307] Lower courts have interpreted *Richmond Newspapers* and its progeny to provide a right of access that extends beyond the confines of the criminal proceeding.[308] Several circuit courts have agreed that the application of *Richmond Newspapers* is appropriate not only in civil cases, but also in administrative proceedings.[309]

The application of *Richmond Newspapers* is appropriate in both *Detroit Free Press* and *North Jersey Media Group* because both cases are factually distinguishable from *Houchins.* Justice Brennan admitted that "the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information."[310] Citing *Houchins* specifically to support that proposition, Justice Brennan acknowledged that the First Amendment might not grant a right of access in every situation, including prison facilities.[311] Justice Burger noted in his majority opinion in *Richmond Newspapers* that "penal institutions . . . by definition, are not 'open' or public places."[312] Access to government information when that information has historically been available to the public is important to support the informed public debate.[313] Unlike the penal institutions at issue in *Houchins*, deportation proceedings are factually distinguishable because they have traditionally been open to the public.[314]

Additionally, deportation proceedings are far more similar to the criminal trial at issue in *Richmond Newspapers* than the prison system at issue in *Houchins.* A deportation proceeding is "analogous to a trial held within the

305. *See id.* at 584-89.

306. *Richmond Newspapers*, 448 U.S. at 587 (Brennan, J., concurring).

307. Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 605 n.13 (1982).

308. William Taylor, *The Sixth Circuit Holds that the First Amendment Provides a Limited Right of Public Access to Deportation Hearings*, 56 SMU L. REV. 1051, 1053 (2003).

309. *Id.* at 1054.

310. *Richmond Newspapers*, 448 U.S. at 585.

311. *Id.* at 586.

312. *Id.* at 577 n.11.

313. *Id.* at 589.

314. Detroit Free Press v. Ashcroft, 303 F.3d 681, 701 (6th Cir. 2002).

judicial branch."[315] Like a criminal or civil proceeding, a deportee must receive notice of the deportation proceeding.[316] Evidence can be presented by both parties and the deportee has the right to cross examine all witnesses.[317] The deportee may appeal the decision by the immigration judge.[318] "[T]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom."[319] Like a criminal proceeding, the severity of punishment attached to a deportation proceeding lends itself to the conclusion that deportation proceedings are important sources of public interest.[320] The First Amendment supports the idea that "debate on public issues should be uninhibited, robust, and wide-open."[321] As an issue of great public interest, it is important that the courts apply the *Richmond Newspapers* experience and logic standard to determine whether deportation proceedings enjoy First Amendment protection.

B. The Two-Part Richmond Newspapers Test

As noted, the application of the two-part standard is difficult in light of its present ambiguity. Pending a decision from the Supreme Court, the lower courts should look to Justice Brennan's structural interpretation of the First Amendment for guidance in the application of the two-part standard. The experience and logic test was promulgated as a practical limitation on the right of access. "This judicial task is as much a matter of sensitivity to practical necessities as it is of abstract reasoning."[322] From this perspective, it seems that Judge Keith of the Sixth Circuit interpreted and applied the *Richmond Newspapers* standard correctly. Judge Keith assessed the experience prong by evaluating whether or not deportation proceedings enjoyed "favorable judgment of experience."[323] Additionally, the court considered both the positive and negative consequence of access in the logic prong of the test.[324] In doing so, Judge Keith correctly concluded that the First Amendment confers a qualified right of access to deportation hearings.

315. Gabriel S. Oberfield, *Press Rights in Peril: The Department of Justice Infringes Upon Press Liberties by Conducting "Special Interest" Removal Proceedings*, 13 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1209, 1218 (2003).

316. *Id.* at 1217.

317. *Id.* at 1218.

318. *Id.*

319. *Detroit Free Press*, 303 F.3d at 696.

320. *Id*.

321. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

322. *Id.* at 588 (Brennan, J., concurring).

323. *Detroit Free Press*, 303 F.3d at 700.

324. *Id.* at 703-05.

1. The Experience Prong

The basic disagreement between Judge Becker and Judge Keith surrounding the experience prong centers on Judge Becker's belief that deportation proceedings do not have a history sufficient to satisfy the *Richmond Newspapers* standard. Experience of openness is necessary because "tradition of accessibility implies the favorable judgment of experiences."[325] As long as the history of access is sufficient to determine if the access has implied a favorable judgment, the history of openness should be sufficient to satisfy the experience standard. This is demonstrated in *Press Enterprise II* when the Court used eighteenth- and nineteenth-century historical evidence to satisfy the experience portion of the test. Despite the fact that pretrial proceedings lacked a common law history of access, the Court concluded that openness had revealed the favorable judgment of experience.[326] By approaching the test from a structural perspective, it is clear that history of openness need not be as extensive as that articulated in the *Richmond Newspapers* opinion. It is sufficient to determine whether or not access to deportation proceedings implies the favorable judgment of experience. The history need not reach common law origin in order to determine whether or not the proceeding has this effect.

Although deportation proceedings lack a common law history of openness, the history of openness has been consistent.[327] "Before the September 11 attacks, the press and the public enjoyed a qualified right to observe immigration court removal proceedings."[328] Immigration judges have discretion to close deportation proceedings in limited circumstances.[329] Based on the fact that immigration judges possess this discretionary power and have exercised it in select cases, Judge Becker concluded that the history of access to deportation proceedings is "inconsistent" and "ambiguous."[330] The immigration judge's exercise of discretion in limited circumstances is insufficient to deny First Amendment protection to deportation proceedings. Supreme Court precedent regarding the right of access under the First Amendment only recognized a "qualified right of access for criminal proceedings, which may be restricted by a countervailing public interest."[331] For instance, the fact that criminal proceedings are often closed to the public in instances of child and spousal abuse did not lead the Supreme Court to

325. *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).

326. Hayes, *supra* note 10, at 1130.

327. *Richmond Newspapers*, 448 U.S. at 589.

328. Oberfield, *supra* note 315, at 1218-19.

329. Thomas V. Ayala, *Issues in the Third Circuit: Development of the First Amendment Right of Access to Adjudicatory Hearings in the Third Circuit: Does the Ongoing Threat of Terrorism Call for a Secret Justice System?*, 48 VILL. L. REV. 1303, 1316 (2003).

330. *See* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198 (3rd Cir. 2002).

331. *Id.* at 222 (Scirica, J., dissenting) (citing *Richmond Newspapers*, 448 U.S. at 580-81).

conclude that access to criminal proceedings has been inconsistent or ambiguous.[332]

Because of the fact that deportation proceedings have been presumptively open to the public subject to the limited discretion of the immigration judge to close the proceedings in select cases, the experience of openness is sufficient to satisfy the experience prong of the *Richmond Newspapers* test.

2. The Logic Prong

After determining that deportation proceedings satisfy the experience portion of the two-pronged test, one must also determine whether the logic portion of the inquiry is satisfied. It is Justice Brennan's determination that a history of openness alone was insufficient to conclude that access to particular government information should be afforded First Amendment protection.[333] Rather, it is crucial to consider whether access is beneficial to that particular process.[334] If access is found to be beneficial to a particular government proceeding, then experience and logic will both be satisfied and the First Amendment will protect access to a particular proceeding.

Both Judge Becker and Judge Keith agree with the conclusion that openness is beneficial to deportation proceedings. First, the similarity between the deportation proceedings and criminal trials supports the conclusion that openness would be positive.[335] More specifically, access to deportation proceedings would support fairness, inform the public of important government functions, ensure the proper execution of this country's immigration laws and deportation proceedings and act as a check on any abusive government practice.[336] Access would also provide therapeutic value to a community that has suffered tremendously following the terrorist attacks on September 11, 2001.

The Supreme Court promulgated the logic standard in order to consider the practical effect of access to a particular proceeding.[337] If the practical effect of access is assessed more accurately by looking at both the positive and negative implications of access, then the true purpose of the logic standard has been served. "An assertion of the prerogative to gather information must . . . be assayed by considering the information sought and the opposing interests invaded."[338] Justice Brennan therefore insists that the reviewing court specifically evaluate the effect of access on a particular proceeding. Both the Sixth Circuit and the Third Circuit considered the negative impact that access

332. *See id.* at 222 n.3.
333. *Richmond Newspapers*, 448 U.S. at 588-89 (Brennan, J., concurring).
334. *Id.* at 589.
335. *See supra* notes 314-320 and accompanying text.
336. *See* Detroit Free Press v. Ashcroft, 303 F.3d 681, 703-04 (6th Cir. 2002).
337. *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring).
338. *Id.* at 588.

might have on deportation proceedings. However, the Sixth Circuit and the Third Circuit disagreed regarding the negative impact of access. Judge Keith concluded that "the government has not identified one persuasive reason why openness would play a negative role in the process."[339] Considering both the positive and negative impact of access to deportation proceedings as a whole, Judge Keith correctly concluded access would play a positive role. Judge Keith determined that national security concerns were limited to special interest cases and therefore the concern was more appropriately considered as a compelling interest under strict scrutiny.[340]

Judge Becker disagreed with Judge Keith's application and chose instead to consider national security in the logic portion of the *Richmond Newspapers* analysis.[341] Citing extensive evidence that open deportation proceedings would threaten national security, Judge Becker concluded that the logic portion of the *Richmond Newspapers* analysis had failed. However, this conclusion was reached erroneously because "[a]t this stage, we must consider the value of openness in deportation hearings generally, not its benefits and detriments in 'special interest' deportation hearings in particular."[342] Considerations that are particular to a small sub-class of deportation proceedings rather than deportation proceedings as a whole should be evaluated when the court engages in a strict scrutiny analysis.[343] Though national security is an important consideration for special interest cases, it generally is not applicable to all deportation proceedings. "There are many grounds for deportation—marriage fraud, moral turpitude convictions, and aggravated felonies, to name a few—that do not ordinarily implicate national security."[344] Because of the fact that national security concerns do not affect the majority of deportation proceedings, but rather such concerns are unique to a small number of proceedings, national security concerns should be addressed when the court engages in a strict scrutiny analysis.[345]

This conclusion is clearly grounded in the Supreme Court's right of access precedent. In *Globe Newspaper*, the Court considered the effect of open access on criminal trials in general and not those involving minor sex victims.[346] After deciding that the public had a First Amendment right of access in criminal proceedings, the Court concluded that the state may close the rape cases involving minor victims on a case-by-case basis.[347] The First

339. *Detroit Free Press*, 303 F.3d at 705.
340. *Id.*
341. *See* N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 217-18 (3rd Cir. 2002).
342. *Id.* at 225 (Scirica, J., dissenting).
343. *See* Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 605 n.13 (1982).
344. *N. Jersey Media Group*, 308 F.3d at 225 (Scirica, J., dissenting).
345. *Id.*
346. *Globe Newspaper*, 457 U.S. at 605 n.13 (1982).
347. *See supra* notes 104-14 and accompanying text.

Amendment right of access is a qualified right that may be restricted if a compelling government interest exists and the government narrowly tailors the restriction to meet that interest. However, a compelling government interest that is present in a few, easily-identifiable cases is not sufficient to restrict access to deportation proceedings as a whole. Therefore, the Third Circuit was wrong in its denial of a First Amendment right of access to deportation proceedings. The Sixth Circuit was correct in its conclusion that both the experience and logic portion of the *Richmond Newspapers* test was satisfied with respect to deportation proceedings, despite national security concerns.

C. Strict Scrutiny

It has been sufficiently established that the public should enjoy a constitutional right of access under the First Amendment. Not only is the *Richmond Newspapers* test correctly applied in *Detroit Free Press*, it is clearly satisfied with respect to deportation proceedings. The Sixth Circuit validly concluded that the First Amendment affords the press and public a qualified right to deportation proceedings. However, the government may regulate and restrict access to information if it has a compelling government interest and the restriction is narrowly tailored to serve that interest.[348] The strict scrutiny analysis ensures that the government will be able to protect its compelling interests while protecting individual First Amendment rights.

The government claimed that national security is a compelling reason to close deportation proceedings in special interest cases. The government argued that "[c]losure of removal proceedings in special interest cases is necessary to protect national security by safeguarding the Government's investigation of the September 11 terrorist attack and other terrorist conspiracies."[349] In light of the government's interest in national security, especially in cases of terrorism, the Sixth Circuit was justified in deferring to the government's assertion that open deportation proceedings implicate national security concerns. "Courts have consistently recognized the need for 'heightened deference to the judgments of the political branches with respect to matters of national security' when 'terrorism or other special circumstances' are at issue."[350] However, "deference is not a basis for abdicating our responsibilities under the First Amendment."[351] Therefore, the government must make specific findings that the Creppy Directive is narrowly tailored in order to shield First Amendment right of access.

348. *Globe Newspaper*, 457 U.S. at 606-07.

349. Detroit Free Press v. Ashcroft, 303 F.3d 681, 705 (6th Cir. 2002).

350. *N. Jersey Media Group*, 308 F.3d at 226 (quoting Zadvydas v. Davis, 533 U.S. 678, 696 (2001)).

351. *Id.*

While the government's interest in national security is compelling, it does not provide the basis for broad restriction of access in all cases the Attorney General deems special interest cases. The Supreme Court and the First Amendment require that the government narrowly tailor its restrictions in order to protect First Amendment interests. Closure is only appropriate if "'reasonable alternatives to closure' are not available to protect the government's interests."[352] The court should not support a government restriction unless that restriction clearly serves national security interests. *Detroit Free Press* correctly concluded that the government failed to narrow its restriction carefully. The Creppy Directive fails to secure the government's interest and fails to recognize that closure could be handled on a case-by-case basis. Therefore, the Creppy Directive is an unconstitutional restriction on the public's right of access to deportation proceedings.

VI. CONCLUSION: A VALID COMPROMISE

Despite the circumstances under which *Detroit Free Press* and *North Jersey Media Group* reached the Third and Sixth Circuits, it is clear that the conflict can be resolved by a closer look at the principles articulated in the *Richmond Newspapers* opinion. When Justice Brennan issued his groundbreaking concurrence in *Richmond Newspapers*, he was ultimately concerned that a structural view of the First Amendment would create a limitless right of access.[353] The practical limitations inherent in a limitless right would have burdened the political branches. Therefore, Justice Brennan restricted this right by creating the experience and logic test. This limitation is meant to assess the practical limitations of allowing access to a particular proceeding.[354] At times of national crisis, like September 11, it is easy to forget the importance of a right of access and the civil rights that *Richmond Newspapers* serves to protect. Judge Keith applied the *Richmond Newspapers* standard correctly and recognized a qualified right of access to deportation proceedings.[355] This opinion considers national security interests without unduly burdening First Amendment liberties.

Judge Becker is validly concerned that free and open access to all deportation proceedings might jeopardize national security in particular cases. However, it is important that the judiciary balance the interest in national security with First Amendment rights. As George W. Bush so poignantly noted in the days following the September 11 attacks: "We are in a fight for

352. *Id.* at 225-26 (quoting Press-Enterprise II, 478 U.S. 1, 14 (1986)).

353. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 588 (1980).

354. *Id.* at 588-89.

355. Detroit Free Press v. Ashcroft, 303 F.3d 681, 700 (6th Cir. 2002).

our principles, and our first responsibility is to live by them."[356] Judge Keith accurately captures the balance between national security and civil liberties by allowing public access to deportation proceedings. By eliminating broad closures of special interest cases, individual First Amendment freedoms are guarded while cases posing a specific and demonstrated risk to national security will remain closed to the public.

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356. 123 CONG. REC. S9553, S9555 (daily ed. Sept. 20, 2001) (Message from President George W. Bush).

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